No. 14,496

IN THE

United States Court of Appeals

For the Ninth Circuit

EDWIN B. SWOPE, Warden United States Penitentiary, Alcatraz, California,
Appellant,

vs.

SELVIE W. WELLS,
Appellee.

APPELLEE'S REPLY BRIEF.

MORRIS M. GRUPP,
ALBERT E. POLONSKY,
350 Mills Tower, San Francisco 4, California,
Attorneys for Appellee.

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THE FACTS.

The facts as set forth by the appellant are correct.

THE QUESTIONS.

The appellant presents two questions, the answers to which are determinative of the issues involved in this appeal:

"1. Did the District Court have jurisdiction to issue a Writ of Habeas Corpus after a Motion under Section 2255 of Title 28, U.S.C.A., was denied by the sentencing Court?

2. Can there be consecutive sentences for 'entering a bank with intent to commit bank robbery and putting in jeopardy the life of a person by the use of a dangerous weapon'?"

ARGUMENT.

THE FIRST QUESTION PRESENTED BY APPELLANT.

As to the first question, appellee urges that in the instant case the District Court properly issued the writ of habeas corpus.

An examination of the background of Section 2255, Title 28, U.S.C.A., discloses that it was originally offered as both a procedural and a jurisdictional measure before Congress. It was adopted in its present form after long discussions, and after members of the judiciary took part in presenting it to Congress. It was suggested that its adoption would alleviate some of the back-log of habeas corpus proceedings in those districts in which federal prisoners were incarcerated.

It is to be noted that if the purpose of Section 2255 is procedural, it merely provides another or cumulative method to the habeas corpus proceedings. This must be so because the right to the remedy of habeas corpus is guaranteed by the Constitution of the United States, Article I, Section 9, Paragraph 2.

It cannot therefore be successfully contended that a procedural statute can overrule the plain mandate of the Constitution of the United States.

Secondly, if Section 2255 is to be interpreted as a sole remedy, then we are still confronted with the plain mandate of the Constitution, which provides that the right of habeas corpus "shall not be suspended unless when in cases of rebellion or invasion, the public safety may require it;" (Art. I, Sec. 9, Para. 2, Constitution); therefore, the Act of Congress in affording jurisdiction can only mean that Section 2255 is to provide an alternate method for determining certain questions.

Appellee agrees that the District Court was correct in stating that one must follow the procedure outlined in Section 2255, but maintains that thereafter he has a right to petition for habeas corpus in the district where he is incarcerated, where he is serving a void sentence.

There are serious doubts as to the constitutionality of Section 2255, if it is to be interpreted as an exclusive remedy. In *Hayman v. United States*, 187 Fed. (2d) 456, this Court held that section unconstitutional. Although certiorari was granted and this case was subsequently decided by the Supreme Court in *United States v. Hayman,* 72 S.Ct. 263, (and although this latter citation is often used as sustaining the constitutionality of Section 2255), the Supreme Court *did not* decide the constitutionality thereof. At page 274 of 72 S.Ct., after pointing out that the District Court erred in determining factual issues, "under such circumstances, we do not reach constitutional questions", the Court pointed out further that even where a constitutional question is

properly presented, it will not pass upon it unless such adjudication is unavoidable.

We are unable to find any other United States Supreme Court decision determining the constitutionality of Section 2255.

It would therefore appear that in this district, the decision of this Court as to the constitutionality of Section 2255 is still controlling.

In the case of *Barrett v. Hunter,* 180 Fed. (2d) 510 and 20 A.L.R. (2d) 965, (where this question is annotated), the Court, discussing Section 2255, stated:

> "Section 2255 does not in our opinion apply to applications for a writ predicated on fact arising after the imposition of sentence, such as, for example, where the sentence has been fully served, and the prisoner is unlawfully thereafter detained in custody."

The facts of the instant case bring it squarely within the above quotation.

The case of *Martin v. Hiatt,* 174 Fed. (2d) 350, decides that Section 2255 is an additional remedy, but does not discuss the question of whether or not a petition for habeas corpus can be used after following the procedure there set forth. In that case, although there was no prior application under Section 2255, it seems to be good law for the statement that habeas corpus is an additional remedy to Section 2255 and that Section 2255 does not eliminate the right of habeas corpus.

There is another and more serious objection to the conclusion that Section 2255 supersedes that right to habeas corpus, under the facts of this particular case. Under habeas corpus, any finding of fact on a particular point is not *res judicata* as to the facts determined in a particular petition for a writ of habeas corpus. Under Section 2255, any decision on issues raised is *res judicata.* In fact, the judgment in the proceeding under Section 2255, being *res judicata,* is therefore strictly antagonistic towards a judgment rendered on a petition for writ of habeas corpus, which does not become *res judicata.*

In this particular case, the remedy under Section 2255, being availed of by the prisoner without any effect, is therefore incomplete and inadequate to further determine the legality of his detention. If he is illegally detained then it must follow that he should have the right to proceed by way of a writ of habeas corpus.

Habeas corpus has been one of the priceless privileges under our form of government, guaranteed by our Constitution. It is and has been the major method used to protect persons from unconscionable acts by those holding public office. It has been, and we trust will remain, one of the cornerstones of our freedom.

To contend that the right of habeas corpus can be so eliminated by a law adopted by Congress is to contend that the Constitution can be amended or superseded by any Act of Congress.

Appellee therefore concludes:

1. That 2255 is merely a cumulative or additional remedy to habeas corpus, in instances where one is serving under a void sentence, and that before a petition for a writ of habeas corpus can be filed, the petitioner must show that he has first availed himself of his rights under Section 2255. After that has been done, then petitioner is entitled to the use of the petition for writ of habeas corpus.

2. A serious question of the constitutionality of Section 2255 is raised by the contention that an Act of Congress overrides the plain import of the language of the Constitution, by placing insurmountable road-blocks in the way of any person attempting to avail himself of his just right to question the legality of his incarceration.

3. The prisoner has done everything required of him under Section 2255 and now has the right to proceed by reason of habeas corpus, even though Section 2255 is thought to be constitutional.

THE SECOND QUESTION PRESENTED BY APPELLANT.

As to the second question presented by appellant, it now seems well settled that the single act of entering and robbing a bank does not constitute more than one crime. The case of *Lockhart v. United States,* 136 Fed. (2d) 122, at page 124, held:

> "Although the indictment contained three counts, statute upon which it was based creates only one crime. This concession made by the

> government in *Holliday v. Johnston,* supra, 313 U.S. Page 349, 61 S. Ct. 1017, 85 L. Ed. 1392, is adhered to here and is supported by *Durrett v. United States,* (5th Cir.) 107 Fed. (2nd) 438 at 439; *Wells v. United States* (5th Cir.) 124 Fed. (2nd) 334; *Hewitt v. United States* (8th Cir.), 110 Fed. (2nd) 1 at Page 10; and *Dimenza v. Johnston* (9th Cir.), 130 Fed. (2nd), 465 at 466. As epitomized in the Dimenza case, 'These Courts held that the offense of bank robbery by the use of deadly weapons as defined in Section 588B (b) is the same offense described in Section 588B (a), aggravated by use of a deadly weapon, and that Congress did not intend to define two separate offenses but only one, either aggravated or not.' "

To the same effect, and using almost identical language, the 9th Circuit, in *Coy v. Johnston,* 136 Fed. (2d) 818 at 819, held that the offense of robbery by use of a deadly weapon as defined in Section 588B(b) is the same offense as that described in Section 588B(a).

The instant case comes squarely within the provisions of *Holbrook v. United States,* 136 Fed. (2d) 649, where the Court under a similar situation refused to set aside a 20 year sentence upon the serving of a 5 year sentence because that was the shorter sentence. In the instant case the 25 year sentence, which is the longer of the two sentences, has already been served, and no legal reason exists to compel the execution of the 20 year sentence on the fourth count.

Hewitt v. United States, 110 Fed. (2d) 1, cites *Durrett v. United States,* 107 Fed. (2d) 438, to the

effect that the statute in question creates but one offense and only one sentence may be imposed thereunder; it also cites *Casebeer v. United States,* 87 Fed. (2d) 668, in support of the conclusion that an indictment which charges the offense under Section 588C of Title 12, U.S.C.A. (Bank Robbery Accompanied by Kidnapping) covered the offenses defined in Section 588B.

Simunov v. United States, 162 Fed. (2d) 314 (6th Cir.) was on an indictment in four counts charging appellant with entering a bank with intent to commit a felony, stealing, putting a life in jeopardy by the use of a dangerous weapon, and attempting to avoid apprehension by forcing a bank officer to accompany him without the consent of such officer. At page 315 the Court said:

> "It is now settled that the statute dealing with the offense of bank robbery creates but a single offense with various degrees of aggravation permitting sentences of increased severity."

A blanket sentence of 65 years was reduced to 25 years.

Dimenza v. Johnston, 130 Fed. (2d) 465 (9th Cir.), was on an indictment of four counts for bank robbery by force and violence, putting in fear with use of a deadly weapon, jeopardizing the lives of three separate persons, and also charged a conspiracy to commit bank robbery. This Court reviewed the question here involved, pointing out that the test in determining whether more than one offense is charged in an

indictment or denounced by statute is whether or not each supposed offense requires proof of some fact which the others do not. This Court pointed out that Section 588B(a) describes the offense of bank robbery by taking from the person or presence of another by force or violence or by putting in fear, whereas Section 588B(b) deals with the commission or attempt to commit the foregoing offense by assaulting or putting in jeopardy the life of any person by the use of a dangerous weapon or device.

Citing various cases referred to in this brief, this Court pointed out that the offense of bank robbery by the use of deadly weapons as defined in Subsections (a) and (b) of Section 588B is the same offense and that Congress did not intend to define two separate offenses but only one, either aggravated or not.

This Court held to the same effect in *McDonald v. Johnston,* 149 Fed. (2d) 768.

Thus we must conclude that the alleged offense in the Fourth Count, to wit, the entering of the bank with the intent to commit robbery, cannot be deemed other than the same offense which was consummated. It could apply to no other offense, as was clearly set forth in *Jerome v. United States,* 318 U.S. 101, 63 S. Ct. 483, and *Darnett v. Hunter,* 138 Fed. (2d) 448.

The decision of the Court of Appeals for the 5th Circuit in the instant case is clearly erroneous under its own decisions.

In *O'Keefe v. United States,* 158 Fed. (2d) 591 (5th Cir.), the defendant pled guilty to two counts,

to wit, the taking of the money by force and violence and by putting in fear the cashier of a named bank. The Court held it was *one* offense and only *one* sentence could be imposed.

In *Gant v. United States,* 161 Fed. (2d) 793 (5th Cir.), a defendant was charged in four counts. The fourth count charged an assault against a customer of the bank, an entirely different person than the party who allegedly was assaulted in the third count. At page 795 the Court held:

> "The United States admits that a count drawn under Subsection (a) and a count drawn under Subsection (b) covering the same robbery can constitute but one offense, and that in this case Counts Three and Four merely charge the commission, in aggravated form, of the same offense laid in Counts One and Two."

The Court then points out at page 795, that decisions rendered since the imposition of the original sentence in that case make it clear:

> "and, in fact, it is conceded, that only one offense was chargeable under the two subsections (a) and (b)."

At page 796 the Court states:

> "The greater includes the lesser. A defendant charged with murder may be convicted of manslaughter, and in like manner, a defendant charged with bank robbery under Section 588B (b) may under the same indictment be convicted of a charge of bank robbery under Section 588B(a)."

At page 796 the Circuit Court for the 5th Circuit discusses its own decision in the case of *Wells v. United States,* 124 Fed. (2d) 334 (5th Cir.), wherein it states:

> "We upheld the larger sentence imposed under Counts Three and Four and remanded the case to the lower court to make a correction by vacating the sentence under Counts One and Two."

It is significant that the Court uses the word "sentence" in the *singular,* rather than "sentences" in the plural, and it raises a decided question as to just what was meant by the Court in the decision of *Wells v. United States,* supra.

Notwithstanding that earlier the 5th Circuit decided the case of *Durrett v. United States,* 107 Fed. (2d) 438, the Court in the case of *Wells v. United States* started its decision *with an erroneous premise* by stating at page 335:

> "Section 588B (a), supra, creates four separate and distinct crimes. Two of these, robbery of a bank by force and violence and putting in fear, and entering of a bank with intent to commit a felony therein, were charged by Counts One and Four, respectively. Section 588B (b) creates no separate offense, but it provides for increased punishment if the crimes named in Subsection (a) are committed under aggravated circumstances. For *each* offense committed under Subsection (a), the statute contemplates but one sentence, the severity thereof depending upon the manner of its perpetration." (Italics ours.)

In support of this later statement, the Court cites the cases of *Holliday v. Johnston,* supra, and *Durrett v. United States,* supra, and *Hewitt v. United States,* supra. We do not believe these cases support the full above quoted statement of the 5th Circuit Court. Those cases distinctly hold that Section 588B (a) *does not* create four separate and distinct crimes but only one offense. The Court thereafter went forward on the mistaken premise that the entry of a bank with intent to commit a felony therein, which was the same entry under which the felony itself was committed, to wit, the robbery of the bank, constituted a separate and distinct crime.

CONCLUSION.

Because, therefore, appellee has fully completed serving the sentence which could legally be imposed; because Section 2255 was not intended as a remedy in derogation of a writ of habeas corpus in instances where, without question, a miscarriage of justice will result; because a void sentence has at all times been subject to attack by habeas corpus; because the four counts under which appellee was convicted constitute but one single offense and are subject to but one sentence; and finally, because, as the Honorable George D. Harris, Judge of the United States District Court, put it in his memorandum opinion filed in this case, which was concurred in by the Honorable Louis E. Goodman:

> "If habeas corpus is not available to the petitioner under the extreme circumstances of this case, then it is clear that procedural due process has not been and cannot be accorded to Wells. Procedural rigidity should not be permitted to supplant substantial justice." (R. 24.)

It is respectfully submitted that the decision and judgment of the District Court be affirmed.

Dated, San Francisco, California,
December 29, 1954.

Respectfully submitted,

MORRIS M. GRUPP,
ALBERT E. POLONSKY,
Attorneys for Appellee.